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ENFORCEMENT OF THE MERGER LAWS BY PRIVATE PARTY LITIGATION

EARL W. KINTNER† AND MERLE F. WILBERDING††

The rising tide of economic concentration has become an increasing cause of concern during the past two decades.¹ The full impact of this wave of merger activity has not yet been ascertained. It is clear, however, that there has been a significant decrease in the number of firms, while a significant increase in the size of existing companies has taken place. This economic phenomenon has not gone unnoticed in either the public or private sectors. The Government has maintained an increasingly effective enforcement of the antitrust laws relating to mergers,² an enforcement program which has been amplified by what sometimes seems to be the universal rule that the Government always wins.

In addition to both civil and criminal governmental actions, Congress has enacted legislation which permits, indeed encourages, private litigants to enforce the antitrust laws. Section 4 of the Clayton Act provides, in part:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.⁴

The prospect of a treble damage recovery provides sufficient incentive for a private plaintiff to institute an action to enforce the antitrust laws.⁵

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1. Cf. FTC, *ECONOMIC REPORT ON CORPORATE MERGERS* 29 (1969).

2. See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

3. *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting); *Window on Washington*, 5 *MERGERS & ACQUISITIONS* 56, 57 (1970).

4. 15 U.S.C. § 15 (1970).

5. See, e.g., *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969).

Thus, private treble damage actions have significantly aided the enforcement of the antitrust laws. The great majority of these actions have been premised upon violations of §§ 1 and 2 of the Sherman Act and §§ 2 and 3 of the Clayton Act.⁶ Although sometimes overshadowed by the statutes upon which other private actions are premised, § 7 of the Clayton Act,⁷ the merger law, is also an "antitrust law,"⁸ as specifically provided in § 1 of the Clayton Act.⁹ Section 7 can, therefore, be enforced by a private litigant. In exercising his right to enforce § 7, the private litigant can seek either an equitable remedy (injunction or divestiture) or a legal remedy (money damages). The former remedy is governed by § 16, while the latter is governed by § 4.

EQUITABLE REMEDIES

A most effective enforcement tool for the private litigant is specifically authorized by § 16 of the Clayton Act. This provision states, in relevant part:

[A]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . as against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . .¹⁰

The effectiveness of this provision was upheld in *American Crystal*

6. 15 U.S.C. §§ 1, 2, 13, 14 (1970). Cf. Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5 (1959); Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958) [hereinafter cited as Loevinger]; MacIntyre, *The Role of the Private Litigant in Antitrust Enforcement*, 7 ANTITRUST BULL. 113 (1962) [hereinafter cited as MacIntyre]; Stein, *Section 7 of the Clayton Act as a Basis for the Treble-Damage Action: When May the Private Litigant Bring His Suit?*, 56 CALIF. L. REV. 968 (1968) [hereinafter cited as Stein].

7. 15 U.S.C. § 18 (1970).

8. See, e.g., *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 488 (5th Cir. 1967); *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346 (3d Cir. 1964), *aff'd*, 381 U.S. 311 (1965); *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521 (S.D.N.Y. 1965); *Kirihara v. Bendix Corp.*, 306 F. Supp. 72 (R. Hawaii 1964). *Contra*, *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 728 n.3 (8th Cir. 1964); *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705 (D. Hawaii 1964), *aff'd*, 401 F.2d 182 (9th Cir.), *cert. denied*, 393 U.S. 1086 (1968); *Gottesman v. General Motors Corp.*, 221 F. Supp. 488 (S.D.N.Y. 1963), *rev'd*, 414 F.2d 956 (2d Cir. 1969).

9. "Antitrust laws," as used herein, includes . . . this Act.

15 U.S.C. § 12 (1970).

10. 15 U.S.C. § 27 (1970).

*Sugar Co. v. Cuban-American Sugar Co.*¹¹ The defendant had acquired a substantial block of stock in the plaintiff corporation. The parties were competitors in the same product market, refined sugar, and in the same geographic market, a ten-state area spreading over the Mississippi River valley. The plaintiff was granted an injunction which prohibited the defendant from voting its American Crystal stock, from acquiring representation on the American Crystal board of directors and from acquiring additional stock of the plaintiff corporation.¹² Before granting the injunction, the court first had to determine that the evidence established a violation of § 7. Even though the plaintiff had not established any elimination of competition, proof that the defendant's program was designed to bring a "closer association" between the two corporations was held sufficient to demonstrate that the acquisition of stock by the defendant tended to lessen competition.¹³ This conclusion was necessary to implement fully the Clayton Act's intent to "arrest restraints of trade in their incipency."¹⁴ There was no requirement that the plaintiff prove that competition was actually lessened.¹⁵ It was only necessary to demonstrate that the acquisition could have lessened competition, and that the plaintiff was threatened with loss or damage thereby.

The importance of *American Crystal Sugar Co.* lies in its affirmation of the private party's right to enforce the merger law, § 7 of the Clayton Act, through an action for an injunction. This result is in accord with the congressional intent that this private right of action provide a necessary and vigilant enforcement of the Clayton Act.¹⁶ While probably not as economically enticing to the private litigant as a treble damage action,¹⁷ the equitable right under § 16 of the Clayton Act does provide a remedy. An injunction can prevent the incipient evil from maturing into an actual restraint. In order to invoke the § 16 equitable remedy, the plaintiff need only show a threatened loss or damage by a merger or acquisition. In *American Crystal Sugar Co.*, the threatened loss was the expense the plaintiff could expect if the Justice Department instituted enforcement proceedings against it.¹⁸ Therefore, it appears that § 16, as a tool in the

11. 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958).

12. *Id.* at 400. The plaintiff also sought divestiture of the already-held stock, but the court declined, believing that the injunction was sufficient relief to protect the plaintiff's interests. *Id.* at 400-01.

13. *Id.* at 395.

14. S. REP. NO. 1775, 81st Cong., 2d Sess. 6 (1950).

15. *Id.*

16. MacIntyre, *supra* note 6, at 113-15.

17. See generally E. TIMBERLAKE, *FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS* (1965) [hereinafter cited as *TIMBERLAKE*]; Loevinger, *supra* note 6.

18. 152 F. Supp. at 393.

field of private enforcement of the antitrust laws, is particularly effective in the area of mergers. If private parties had to establish actual injury to their property before an injunction could be granted, the effectiveness of the cause of action would be significantly decreased, if not nullified. But the courts have consistently followed the express language of § 16. Only a violation and threatened harm need be demonstrated; actual injury is not necessary. The Supreme Court reaffirmed this doctrine in 1969:

That remedy [injunction] is characteristically available even though the plaintiff has not yet suffered actual injury . . . [H]e need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.¹⁹

Although § 16 speaks only of injunctions, with no specific delineation of other equitable relief,²⁰ it seems reasonable to conclude that it also envisions divestiture of stock as an appropriate remedy.²¹ In *American Crystal Sugar Co.*, the court noted, without disapproval, that divestiture was requested in addition to the permanent injunction.²² The court's reason for not granting divestiture was that the injunction was a sufficient remedy "so that divestiture is not necessary."²³ Although divestiture is certainly a harsh remedy,²⁴ its use may be necessary in

19. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969). However, in *Ricchetti v. Meister Brau, Inc.*, 431 F.2d 1211 (9th Cir. 1970), the Ninth Circuit held that cancellation of plaintiffs' (wholesale beer distributors) distributorship agreement did not violate § 7:

Where, as here, a supplier seeks no more than a better equipped and more aggressive distributor for his product, his conduct may in fact be more beneficial than detrimental to competition, and is not condemned by either the Sherman or Clayton Acts. As the antitrust laws do not prohibit a business from fairly entering into a competitive market, neither do they prohibit its improvement of its competitive stature in the product market. . . . Termination of a distributorship does not become a violation of Section 7 simply because the manufacturer or supplier taking such action has recently been involved in a merger or acquisition of stock or assets with another company.

Id. at 1215.

20. *Cf. Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 602 (1951).

21. *Cf. United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 400-01 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958); Van Cise, *Limitations Upon Divestiture*, 19 GEO. WASH. L. REV. 147, 151-53 (1950); Wise, *Three D's of Antitrust Enforcement*, in SOUTHWESTERN LEGAL FOUNDATION, PROCEEDINGS OF THE 1958 INSTITUTE ON ANTITRUST LAWS 114-25 (1958) [hereinafter cited as Wise]; Comment, *Aspects of Divestiture as an Antitrust Remedy*, 32 FORDHAM L. REV. 135 (1963); Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 MINN. L. REV. 267 (1964) [hereinafter cited as *Availability*].

22. 152 F. Supp. at 398.

23. *Id.* at 401.

24. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 602 (1951) (concurring opinion); *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962).

certain instances to give any meaningful effect to an injunction. For instance, an injunction prohibiting a defendant from acquiring additional stock of a company would be of no value if, in fact, the defendant already possessed sufficient stock to control the company's business plans and policies. The practical effect of such an injunction would be meaningless.

Moreover, the idea of divestiture as a proper tool to remedy a § 7 violation is inherent in the nature of the evil proscribed by that statute. If the acquisition of a particular stock is the violation of § 7, the divestiture of that same stock should necessarily be the appropriate remedy.²⁵ In spite of the logic of this position, the judicial formulation of the rule has been a matter of confusion and difficulty. For example, in *American Commercial Barge Line v. Eastern Gas & Fuel Associates*,²⁶ a federal district court, with no discussion or citation of authority, concluded that an "action cannot properly be brought by a private litigant under § 16 of the Clayton Act for divestiture of assets allegedly acquired in violation of the antitrust laws."²⁷ This unsupported conclusion has not been followed elsewhere. Other courts, although not granting divestiture, have suggested that it would be a proper remedy in an appropriate case. For example, in *Julius M. Ames Co. v. Bostitch, Inc.*,²⁸ a federal district court judge concluded that divestiture was within the meaning of § 16 of the Clayton Act. In *Burkhead v. Phillips Petroleum Co.*,²⁹ the court, although acknowledging that the issue was not fully settled, stated that it concurred with the *Bostitch* reasoning:

We are inclined to agree with this conclusion that divestiture *may* be an appropriate form of relief under Clayton Act Section 16 and that we should not rule out the possibility of such relief at this point. While the divestiture would appear to be appropriate only in a limited number of cases where no other form of preventative would suffice, one such case where divestiture might be the only adequate and complete remedy would be where, as here, plaintiff alleges a monopoly and restraint of trade which is injuring the plaintiff.³⁰

Although courts have indicated that divestiture is a proper remedy under § 16, they are very reluctant to so order. For example, in *Schrader v.*

25. *Availability*, *supra* note 21, at 268-70.

26. 204 F. Supp. 451 (S.D. Ohio 1962).

27. *Id.* at 453.

28. 240 F. Supp. 521 (S.D.N.Y. 1965).

29. 308 F. Supp. 120 (N.D. Cal. 1970).

30. *Id.* at 127.

National Screen Service Corp.,³¹ the court pointed out that policy considerations militate against granting divestiture when such action would effect the complete destruction of a nationwide business.³² Other decisions have impliedly indicated that divestiture is an appropriate remedy,³³ have expressly stated so in dicta³⁴ or have held outright that divestiture is appropriate.³⁵

Although opponents of divestiture may argue that the remedy is too severe and that it may destroy a corporation's business, their argument is significantly weakened, if not negated, by the inherent attributes of such an equitable remedy. Foremost of these factors is the judge's discretion in deciding whether or not to grant divestiture. The existence of a § 7 violation does not, ipso facto, require divestiture; the Supreme Court rejected this argument in *United States v. E. I. du Pont de Nemours & Co.*³⁶ Instead the decision whether or not to grant divestiture lies in the sound discretion of the judge.³⁷ Moreover, even if divestiture is granted it is subject to appellate review to determine whether such discretion was abused.

The defendant in a private antitrust suit also has an important interest to protect in considering whether divestiture should be ordered. If it appears that divestiture would be an appropriate remedy, the defendant can take steps to minimize its impact. For example, defendant might be able to negotiate a settlement which would accomplish the same objective without immediate abandonment of the stock. Thus, an injunction might be entered prohibiting the defendant from voting the stock,³⁸ converting the stock to non-voting stock³⁹ or transferring the stock to a trustee.⁴⁰ Partial divestiture and gradual divestiture are other alternatives which might be utilized in a particular case.⁴¹

The scope and use of divestiture as a means of enforcing § 7 has not yet fully matured. Additional judicial development is required to construct guidelines for its applicability as an appropriate remedy. Divestiture is an equitable remedy which can be an extremely effective anti-

31. 95 F. Supp. 66 (E.D. Pa. 1955).

32. *Id.* at 70.

33. *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953).

34. See text accompanying notes 28-30 *supra*.

35. *National Supply Co. v. Hillman*, 57 F. Supp. 4 (W.D. Pa. 1944).

36. 366 U.S. 316, 328 n.9 & text accompanying (1961).

37. *Availability*, *supra* note 21, at 282-83.

38. *Wise*, *supra* note 21, at 122-23.

39. *Id.* at 123.

40. *Id.*

41. *Id.*

trust enforcement weapon. The primary limiting factor is that divestiture makes no recompense to the plaintiff for either his damages or his litigation expenses.⁴²

LEGAL REMEDIES

The counterpart to the equitable remedies of injunction and divestiture is the legal remedy of money damages. In the area of antitrust law, this is particularly attractive to the private litigant⁴³ since § 4 of the Clayton Act authorizes treble damages. Section 4 mandates:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.⁴⁴

Great publicity has been given treble damage actions based upon such notorious Sherman Act violations as price fixing⁴⁵ and market division.⁴⁶ It is also well settled that treble damage recoveries can be predicated upon violations of §§ 2 (price discrimination)⁴⁷ and 3 (tie-in arrangements)⁴⁸ of the Clayton Act. An interesting question, however, is whether a violation of § 7 of the Clayton Act also supports a § 4 treble damage action.⁴⁹ Logically an affirmative conclusion is required. Section 4 authorizes recovery of treble damages for "anything forbidden in the

42. See Loevinger, *supra* note 6, at 174.

43. Loevinger, *Handling a Plaintiff's Antitrust Damage Suit*, 4 ANTITRUST BULL. 29 (1959) [hereinafter cited as *Handling*].

44. 15 U.S.C. § 15 (1970). See generally TIMBERLAKE, *supra* note 17, at 14-15; Guilfoil, *Damage Determination in Private Antitrust Suits*, 42 NOTRE DAME LAW., 647 (1967) [hereinafter cited as Guilfoil]; Loevinger, *supra* note 6, MacIntyre, *supra* note 6.

45. See, e.g., Ohio Valley Elec. Corp. v. General Elec. Co., 244 F. Supp. 914 (S.D.N.Y. 1965); Philadelphia Elec. Co. v. Westinghouse Elec. Corp., 1964 Trade Cas. 79,435 (E.D. Pa. 1964). See generally, Guilfoil, *supra* note 44, at 655-57.

46. Cf. United States v. Sealy, Inc., 388 U.S. 350 (1967).

47. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 378-79 (1958); Bruce's Juices, Inc. v. American Can Co., 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951). See generally E. KINTNER, A ROBINSON-PATMAN PRIMER 297-309 (1970).

48. Alles Corp. v. Senco Products, Inc., 329 F.2d 567 (6th Cir. 1964); Englander Motors, Inc. v. Ford Motor Co., 267 F.2d 11 (6th Cir. 1959). See generally E. KINTNER, AN ANTITRUST PRIMER 47-58 (1964).

49. Note, *Treble Damage Actions for Violations of Section 7 of the Clayton Act*, 38 U. CHI. L. REV. 404 (1971).

antitrust laws."⁵⁰ Section 1 of the Clayton Act⁵¹ makes clear that § 7 is one of the "antitrust laws." Reading those two provisions together, as it appears they must be read, it seems unmistakably clear that a violation of § 7 of the Clayton Act would support a treble damage recovery.⁵²

Despite the logical ease in reaching this conclusion, the litigation involving this question has been long and strewn with obstacles.⁵³ In 1957, immediately after the Supreme Court's decision in the *du Pont* case,⁵⁴ minority stockholders of General Motors brought a treble damage derivative suit in *Gottesman v. General Motors Corp.*⁵⁵ In *Gottesman*, the plaintiffs alleged that du Pont violated not only § 7 of the Clayton Act, but also breached its common law fiduciary duty by selling its products to G.M. at excessive prices. Despite the fact that this was the first case which litigated the propriety of a treble damage award for a violation of § 7 of the Clayton Act, the district court gave short shrift to the issue:

The test . . . is whether "there is a reasonable probability that the acquisition is likely to result in the condemned restraints."

Plaintiffs cannot be damaged by a *potential* restraint of trade or monopolization. There can be no claim for money damages for a violation of section 7.⁵⁶

Since this was a pretrial ruling, appellate review was not automatic and, in this instance, did not occur for over five years.⁵⁷ The pretrial ruling in *Gottesman*, however, was followed in two subsequent decisions. In *Bailey's Bakery, Ltd. v. Continental Baking Co.*,⁵⁸ a district court also refused to proceed on a complaint asking for money damages due to violation of § 7. The district court stated:

Since Clayton § 7 is concerned with the future monopolistic

50. 15 U.S.C. § 15 (1970).

51. 15 U.S.C. § 12 (1970).

52. Stein, *supra* note 6, at 971.

53. One writer remarked that he "has not found a single reported case litigated under § 4, alleging a section 7 violation, which has resulted in an award of damages." Stein, *supra* note 6, at 971.

54. There, the Court held that du Pont's ownership of 23 per cent of the stock of General Motors constituted a violation of § 7 because of du Pont's commanding position as a supplier of automotive finishes and fabrics to G.M.

55. 221 F. Supp. 488 (S.D.N.Y. 1963), *rev'd*, 414 F.2d 956 (2d Cir. 1969).

56. 221 F. Supp. at 493 (emphasis in original).

57. The Second Circuit denied leave to appeal the district judge's ruling in an unreported decision, *cert. denied*, 379 U.S. 882 (1964). The ruling was, however, eventually reversed. 414 F.2d 956 (2d Cir. 1969).

58. 235 F. Supp. 705 (D. Hawaii 1964), *aff'd*, 401 F.2d 182 (9th Cir.), *cert. denied*, 393 U.S. 1086 (1968).

and restraining tendencies of corporate acquisition, *i.e.*, probable (and hence not certain) future restraints on commerce, any damages claimed for prospective restraint of trade would be purely speculative.⁵⁹

In *Highland Supply Corp. v. Reynolds Metals Co.*⁶⁰ the District Court for the Eastern District of Missouri, confronted with the *Gottesman* and the *Bailey's Bakery* decisions and with an indication by the Eighth Circuit in a related proceeding⁶¹ that there was no private right of action, begrudgingly concluded that the cause of action for money damages based on § 7 had to be dismissed.⁶²

The apparent trend toward complete denial of any consideration of treble damage actions for § 7 violations was partially diverted in *Julius M. Ames Co. v. Bostitch, Inc.*⁶³ Factually distinguishing the three earlier cases, the court in *Bostitch* concluded that the nature of the injury in that case permitted a monetary recovery.⁶⁴ The plaintiff in *Bostitch*, pursuant to a pre-existing agreement, was a distributor of metal fasteners procured from Calnail, which was the exclusive agent for Calwire, the manufacturer. The defendant, Bostitch, was the principal competitor in the metal fastener product market. In 1961 Bostitch entered into an agreement by which Calwire would be merged into Calnail and Bostitch would then acquire all the stock of Calnail.⁶⁵ Another integral part of the acquisition agreement called for all "pre-existing arrangements" for the distribution of Calwire products to be eliminated. Thus, the effect of the acquisition was to destroy the plaintiff's distributorship agreement with Calnail. It was this important fact which distinguished the earlier

59. 235 F. Supp. at 717.

60. 245 F. Supp. 510 (E.D. Mo. 1965).

61. *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 728 n.3 (8th Cir. 1964).

62. [Section 16 of the Clayton Act] would appear to be an explicit answer to our proximate cause issue: if a person can suffer threatened loss *by reason of* a violation of [§ 18], then surely he can be "injured in his business or property *by reason of*" that which is prohibited by § 7. This logic can be answered only by arguing that the enumeration of specific sections in § 16 Clayton distinguishes it from § 4 Clayton and that § 4 should be strictly construed in view of the drastic and unusual nature of the treble damage remedy.

It is clear to this court that the Eighth Circuit was well aware of the exact dimensions of this issue of causation when it stated that a private right of action could not accrue from a violation of § 7 Clayton. It has chosen to apply too narrow a concept of causation and this Court must defer thereto.

245 F. Supp. at 513-14 (emphasis in original).

63. 240 F. Supp. 521 (S.D.N.Y. 1965).

64. *Id.* at 525-26.

65. *Id.* at 522.

cases from *Bostitch*. In the earlier cases, at the moment of acquisition, there was only a probability that the plaintiffs would be harmed. In *Bostitch*, at the moment of the acquisition, the plaintiff could point to a specific injury—the loss of his distributorship agreement. Moreover, the plaintiff's loss of the distributorship agreement was caused by an acquisition which had been conceded, for the purposes of that proceeding, to be violative of § 7 of the Clayton Act.⁶⁶ There was no escape from the logical conclusion that the plaintiffs were entitled to seek money damages, and the court accordingly held that the complaint stated a claim upon which relief could be granted.⁶⁷ Two years later the Fifth Circuit, in *Dailey v. Quality School Plan, Inc.*,⁶⁸ held that a treble damage action could be predicated upon a § 7 violation.⁶⁹ In spite of the number of courts which had rejected the argument that money damages could be based upon an illegal acquisition,⁷⁰ the courts in *Bostitch* and *Quality School Plan* concluded that, as a matter of law, a plaintiff was entitled to bring a treble damage action for violation of § 7 of the Clayton Act. The hodgepodge produced by the conflicting decisions left most of the legal world in confusion, if not in outright disbelief. The result was encouragement of forum shopping by plaintiffs attempting to find a district or circuit which was amenable to their position. The confusion, ambiguity and judicial inconsistencies spawned a genuine need to clarify and resolve this split in the law.⁷¹

This need was satisfied in 1969 when the Second Circuit considered the original *Gottesman* pretrial ruling⁷² six years after the district judge had ruled that § 7 of the Clayton Act did not permit a cause of action for money damages.⁷³ After extensive discovery and pretrial proceedings,

66. *Id.* at 524.

67. *Id.*

68. 380 F.2d 484 (5th Cir. 1967).

69. *Cf.* Sam S. Goldstein Indus., Inc. v. Botany Indus., Inc., 301 F. Supp. 728 (S.D.N.Y. 1969). See also, Note, *Private Party Denied Cause of Action for Treble Damages for Violation of Section 7 of Clayton Act*, 64 COLUM. L. REV. 597 (1964) [hereinafter cited as *Private Party*]; Note, *Private Actions Under Sections 4 and 7 of the Clayton Act: A Fresh Look at an Old Problem*, 29 OHIO ST. L.J. 756 (1968) [hereinafter cited as *Private Actions*].

70. See, e.g., *Isidor Weinstein Inv. Co. v. Hearst Corp.*, 303 F. Supp. 646 (N.D. Cal. 1969); *Dairy Foods Inc. v. Farmers Co-op Creamery*, 298 F. Supp. 774 (D. Minn. 1969); *Utah Gas Pipelines Corp. v. El Paso Natural Gas Co.*, 233 F. Supp. 955 (D. Utah 1964). See also TIMBERLAKE, *supra* note 17, § 17.18, at 244-45. In *Bowl America, Inc. v. Fair Lanes, Inc.*, 209 F. Supp. 1080 (D. Md. 1969), the court discussed the issue at some length but made no decision.

71. *Cf.* Stein, *supra* note 6, at 995.

72. 414 F.2d 956 (2d Cir. 1969).

73. 221 F. Supp. 488 (S.D.N.Y. 1963).

the parties had come to trial in 1966, limited to the causes of action arising from du Pont's sale of automotive finishes and fabrics to General Motors for use in its passenger cars. Even on these issues, the trial was limited solely to the questions concerning the liability of du Pont and the injury to General Motors. The issue of the amount of damages, if any, was not to be litigated at this stage. After hearing all the evidence, the district court judge dismissed those causes of action and found that du Pont had neither used its stock to control General Motors' purchases nor abused any fiduciary duty owed to G.M. Since these causes of action were separate claims and because there was no just reason for delay, the findings of the district court were ripe for appellate review.⁷⁴

The Second Circuit gave little consideration to the issues resolved at the trial.⁷⁵ Instead the court reviewed and reversed the district court's 1963 pretrial ruling that § 7 of the Clayton Act could not support a private cause of action for money damages.⁷⁶ After reviewing the cases which had denied the cause of action,⁷⁷ those which had upheld it⁷⁸ and the commentary which had supported recognition of the cause of action,⁷⁹ the Second Circuit concluded that it was in agreement with those authorities who had concluded that § 7 did furnish a basis for money damages in a private action.⁸⁰ Even though § 7 speaks of reasonable probabilities of restraint of trade or monopolization, the court ruled that compensable injury has been demonstrated if actual restraint occurs as a proximate result of the illegal merger or acquisition. The court further stated that even though § 7 connotes violations based on threatened harm, it does not preclude money damage recoveries if actual harm can be proven:

But if the threat ripens into reality we do not see why there

74. FED. R. CIV. P. 54(b).

75. 414 F.2d at 958-59.

76. *Id.*

77. Highland Supply Corp. v. Reynolds Metals Co., 245 F. Supp. 510 (E.D. Mo. 1965); Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D. Hawaii 1964), *aff'd*, 401 F.2d 182 (9th Cir.), *cert. denied*, 393 U.S. 1086 (1968).

78. Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967); Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521 (S.D.N.Y. 1965). Cf. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965); Blaski v. Inland Steel Co., 271 F.2d 853 (7th Cir. 1959); Bender v. Hearst Corp., 263 F.2d 360 (2d Cir. 1959); Rayco Mfg. Co. v. Dunn, 234 F. Supp. 593, 597 (N.D. Ill. 1964). These latter cases impliedly sanctioned a private cause of action for money damages by either dismissing or affirming dismissal of a § 7 money damage claim, not because § 7 would not support the claim, but because the plaintiffs failed to make a sufficient showing of specific, proximate injury. 414 F.2d at 960.

79. J. SCOTT & E. ROCKEFELLER, ANTITRUST & TRADE REGULATION TODAY: 1967, at 340-42 (1967); Stein, *supra* note 6, at 971-80 (1968); Comment, 79 HARV. L. REV. 445 (1965); *Private Actions*, *supra* note 69.

80. 414 F.2d at 960-61.

can never be a private cause of action for damages. If section 7 is designed to prevent acquisitions that "may" or "tend to" cause specified harm such an acquisition may either itself directly bring about the harm, or make possible acts that do. We do not say that a section 7 violation must, or even probably will, have that result; but that it may and that plaintiffs should have a chance to prove injury "by reason of" the violation are persuasive propositions.⁸¹

The Second Circuit decision in *Gottesman* was quickly followed by the District Court for the District of Hawaii in *Kirihara v. Bendix Corp.*⁸² Reversing the position it had taken in *Bailey's Bakery*,⁸³ the district court concluded that it had thrown "too wide a loop" when it stated in *Bailey's Bakery* that no private right of action accrued from a violation of § 7.⁸⁴ Admitting that at the time of the *Bailey's Bakery* decision it was but "a novitiate in the antitrust sect of the judicial priesthood,"⁸⁵ the court concluded that a treble damage action could be premised on a violation of § 7 of the Clayton Act and that a contrary holding would negate the clear inference that Congress intended § 4 of the Clayton Act to apply to all the antitrust laws, including § 7.⁸⁶ The authoritative statement from the Second Circuit in *Gottesman*, coupled with *Kirihara*, seems clearly to indicate that a private cause of action for money damages can be predicated upon a violation of § 7 of the Clayton Act.⁸⁷

VIOLATION, FACT AND AMOUNT OF DAMAGES

Courts have often been confused by the distinction between the right of the litigant to sue and the burden of proof needed to win. The plaintiff must establish both that a certain amount of damages have been incurred and that an injury was caused directly or proximately by the illegal acquisition or merger. This confusion was, perhaps, a major cause of the sort of litigation represented by *Gottesman*. Once the plaintiff has been accorded his right to bring a treble damage action based on an alleged violation of § 7, he still has some very important hurdles to

81. *Id.* at 961.

82. 306 F. Supp. 72 (D. Hawaii 1969).

83. See text accompanying notes 58-59 *supra*.

84. 306 F. Supp. at 88.

85. *Id.* at 81.

86. *Id.* at 88.

87. The *Gottesman* and *Kirihara* decisions were followed in *Isidor Weinstein Inv. Co. v. Hearst Corp.*, 310 F. Supp. 390 (N.D. Cal. 1970) (pretrial opinion); *Western Geophysical Co. v. Bolt Associates, Inc.*, 305 F. Supp. 1251 (D. Conn. 1969); *Metro-politan Liquor Co., Inc. v. Heublein, Inc.*, 305 F. Supp. 946 (E.D. Wis. 1969).

overcome before he can succeed in his quest for treble damages. The *Gottesman* and *Kirihara* decisions, and their progeny, only recognize the plaintiff's cause of action. The plaintiff still must sustain his burden of proof to recover.⁸⁸ Implicit in the above statement is the requirement that the plaintiff must prove, by a preponderance of the evidence: (a) a violation of § 7; (b) the fact of damage to his person or property (which includes injury and causation);⁸⁹ and (c) a reasonably certain amount of damages flowing from that injury.⁹⁰

VIOLATION

First and foremost for the plaintiff to prove is the defendant's violation of one of the antitrust laws, in this instance § 7 of the Clayton Act. Unlike the Sherman Act, which proscribes actual restraints,⁹¹ § 7 makes violative potential restraints based upon probabilities. This, of course, is an advantage to the plaintiff in establishing a violation of the antitrust laws since this standard is more lenient than that provided in the Sherman Act. Moreover, if recent cases brought by the Government⁹² are indicative of the judicial penchant for upholding a violation of § 7, the private plaintiff can be reasonably optimistic about his ability to satisfy this requirement.

In addition, private parties are able to use a prior judgment in a Government suit as *prima facie* evidence of an antitrust violation.⁹³

88. As the Second Circuit stated in *Gottesman*:

[P]laintiffs cannot rest on a showing of a violation of § 7; they must, as in private actions under other sections of the antitrust laws, prove that they have been injured by the violation.

414 F.2d at 961. Proof of the amount of damages is also necessary. Cf. *Guilfoil*, *supra* note 44. See also, *Private Party*, *supra* note 69, at 601; Comment, 79 HARV. L. REV. 445, 446-47 (1965).

89. A few courts have held that the "fact of damage" must be proved to a certainty. See, e.g., *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 958 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); *Momand v. Universal Film Exch., Inc.*, 172 F.2d 37, 43 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949).

90. See *TIMBERLAKE*, *supra* note 17, at 14-15:

Each of these elements must be proved by competent evidence. Merely because the case involves antitrust and that a Congressional purpose fosters such suits, does not mean that the general rules of justice may be cast aside in such a case. While the statutory burden of the plaintiff may not lawfully be increased, neither can that burden be lawfully diminished below the standard imposed by the statute by disregarding other normally established rules and principles.

Id. at 14.

91. Every contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal.

15 U.S.C. § 1 (1970).

92. See, e.g., *United States v. Von's Grocery*, 384 U.S. 270 (1966).

93. One commentator has suggested that:

The evidentiary effect of the judgment in a government suit should be conclu-

This is specifically permitted under § 5(a) of the Clayton Act.⁹⁴ The only limitation upon the use of a prior judgment is that § 5(a) does not apply to consent judgments or, according to judicial interpretation, to *nolo contendere* pleas.⁹⁵ If a private plaintiff is able to use a prior Government judgment as *prima facie* evidence of a violation, his cause is invaluablely enhanced. However, even if the Government action resulted in a consent judgment and is, therefore, inadmissible, the Government's earlier case might disclose other sources from which additional admissible evidence might be gained by further investigation and discovery.⁹⁶ Another valuable factor aiding the plaintiff's cause is that the four-year statute of limitations for the commencement of private actions is tolled while the Government suit is pending.

One question which has not been resolved in this area is whether a violation for one period of time can be proven by use of a Government judgment which established a violation for a different period of time.⁹⁷ This issue arose in the *Gottesman* litigation. The judgment in the Government suit was made as of June, 1949, the time at which the Government suit was brought.⁹⁸ The plaintiffs, minority stockholders of General Motors, were seeking damages for injury incurred by G.M. after May 4, 1950.⁹⁹ Since the two cases covered different time periods, the trial judge ruled that the Government judgment could not be used as evidence against the defendants.¹⁰⁰ The Second Circuit disagreed.¹⁰¹

sive in subsequent litigation, rather than merely *prima facie*, as is now the case in private actions.

Loevinger, *supra* note 6, at 174.

94. 15 U.S.C. § 16(a) (1970). See generally Shores, *Treble Damage Antitrust Suits: Admissibility of Prior Judgments Under Section 5 of the Clayton Act*, 54 IOWA L. REV. 434 (1968); Timberlake, *The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N.Y.U.L. REV. 991 (1961).

95. *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939), *aff'd on other grounds*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 664 (1941). See also Note, *Nolo Pleas in Antitrust Cases*, 79 HARV. L. REV. 1475 (1966); Note, *Section 5 of the Clayton Act and the Nolo Contendere Plea*, 75 YALE L.J. 845 (1966); Note, *The Admissibility and Scope of Guilty Pleas in Antitrust Treble Damage Actions*, 76 YALE L.J. 684 (1967).

96. Cf. *Handling*, *supra* note 43, at 43-44.

97. The situation arises most commonly in conspiracy cases. In those cases courts tend to permit the use of a Government judgment—even though it covers an earlier time period—because of the rule that criminal conspiracies are deemed to continue until abandonment or success. See, e.g., *Hyde v. United States*, 225 U.S. 347 (1912); *United States v. Kissell*, 218 U.S. 601, 608 (1910); *Marino v. United States*, 91 F.2d 691 (9th Cir. 1937).

98. See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

99. "This was apparently the earliest date at which any plaintiff owned General Motors stock." 414 F.2d at 958 n.2.

100. 221 F. Supp. at 494.

101. 414 F.2d at 962.

Acknowledging that some decisions took a strict view and did not permit the admission of a Government judgment unless that judgment pertained to all or a part of the same period alleged in the private action,¹⁰² the court rejected this rigid rule in favor of a more flexible one. This liberal rule would allow determination of the issue after an evaluation of the relevancy and materiality of the judgment to the pending litigation.¹⁰³ In the *du Pont* litigation, although the judgment found that a violation existed as of June, 1949, no relief was decreed until 1961.¹⁰⁴ Thus, it was reasonable to conclude that since there was a probability of the lessening of competition in 1949, that probability continued throughout the 1950's. Therefore, the Government judgment, being relevant and material, was entitled to substantial evidentiary weight in the trial court's determination of whether there was a violation of § 7 after May 4, 1950.¹⁰⁵ If this decision is followed by other circuits and district courts, the result will be a somewhat less restrictive use of Government judgments and, therefore, an additional factor which will encourage private enforcement of the antitrust laws. This flexible standard appears to be more reasonable since the admissibility of a particular judgment is determined by relevance and materiality. This should go far in avoiding needless injustices to private plaintiffs.¹⁰⁶

The proof of a § 7 violation is, therefore, a *sine qua non* to a successful prosecution of a private treble damage suit. The "probability" standard of the Clayton Act, compared to the actual restraint standard of the Sherman Act, should substantially alleviate the plaintiff's burden.

102. *International Shoe Mach. Corp. v. United Shoe Mach.*, 315 F.2d 449 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963); *Orbo Theatre Corp. v. Loew's, Inc.*, 156 F. Supp. 770 (D.D.C. 1957), *aff'd per curiam*, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959). *Cf. Webster Rosewood Corp. v. Schine Chain Theatre, Inc.*, 263 F.2d 533 (2d Cir.), *cert. denied*, 360 U.S. 912 (1959).

103. 414 F.2d at 963.

104. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961) (complete divestiture ordered).

105. On remand, *du Pont* "conceded that its stock interest in General Motors constituted a violation of § 7 during the damage period." 310 F. Supp. 1257, 1258 (S.D.N.Y. 1970), *aff'd*, 436 F.2d 1205 (1971). Although the second Circuit had stated that the judgment was entitled to "substantial evidentiary weight," the district court, on remand, did not discuss whether this was equal to a "prima facie" case. On subsequent appeal, without discussion, the Second Circuit, referring to its earlier opinion, stated that it had held that "the plaintiffs were entitled to have [the government judgment] treated as prima facie evidence in their case." *Id.* at 1208.

106. *Quaere*: Should a prior Government judgment be accorded prima facie weight anytime it is admitted? In cases like *Gottesman* where the time periods of the two suits do not overlap would it not be more reasonable to weigh the Government judgment as "same evidence" or "substantial evidence," but not necessarily as "prima facie evidence?"

Indeed, it should make proof of a violation the easiest of the three hurdles to overcome in seeking a money damages recovery.

FACT OF DAMAGE

The second hurdle in a private treble damage action based upon a violation of § 7 is that the plaintiff must show that he was in fact damaged by the illegal acquisition. This point distinguishes the private action from the Government action in which the Government need only establish a violation in order to obtain relief.¹⁰⁷ This injury-in-fact requirement is perhaps the most difficult aspect of a treble damage action. In addition, the private litigant's burden of proof under § 7 is probably more difficult than his burden in an action based on price fixing or price discrimination. In the latter type of situation, the plaintiff succeeds if he can establish that his competitors paid price X and that he was forced to pay price $X+I$.¹⁰⁸ In an action based on § 7, the plaintiff has to establish that the illegal acquisition directly injured his business. The difficulty is increased since numerous variables and economic factors must be evaluated, regardless of their materiality. The quantum and quality of these variables and economic factors sometimes makes the determination of legal injury appear to be little more than informed speculation.¹⁰⁹

Failure to establish injury was the cause of the plaintiff's eventual defeat in the *Gottesman* litigation.¹¹⁰ In initially permitting the plaintiff to bring the treble damage action, the Second Circuit stated that the plaintiffs, in addition to proving a violation, must "prove that they have been injured by the violation."¹¹¹ Since it was a stockholders' derivative suit, the plaintiffs were required to prove injury to General Motors. Although they had alleged that du Pont had used its ownership of G.M. stock to cause G.M. to purchase its automobile finishes and fabrics from them, the plaintiffs, on the trial, failed to prove that G.M. could have purchased the materials from someone other than du Pont at lower prices with equal service and quality.¹¹² In addition, the small percentage of G.M.'s fabric requirements which were allocated to du Pont significant-

107. Johnston, *Damages Under Section 4 of the Clayton Act from the Perspective of Defence Counsel*, 7 ANTITRUST BULL. 87 (1962); Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231 (1962); Pollock, *The "Injury" and "Causation" Elements of a Private Antitrust Action*, 21 ABA ANTITRUST SECTION 341 (1962) [hereinafter cited as Pollock].

108. Cf. Pollock, *supra* note 107, at 342-43.

109. *Handling*, *supra* note 43, at 31-32.

110. See note 105 *supra*.

111. 414 F.2d at 961.

112. 310 F. Supp. at 1260.

ly deflated the plaintiffs' allegations.¹¹³ The trial judge concluded that G.M.'s decision to purchase du Pont's products was one of "considered business judgments,"¹¹⁴ and was not made because of du Pont's ownership of 23 per cent of G.M.'s stock.

The result in the *Gottesman* litigation is some indication of the difficulty a plaintiff encounters in proving that an acquisition directly caused economic injury to his person or property. In some situations, however, the injury element might not be at all speculative. For example, in *Bostitch* the plaintiff had his distributorship agreement terminated upon the defendant's acquisition of Calnail. Since a specific provision of the acquisition agreement provided that all distributorship agreements were to be cancelled,¹¹⁵ the plaintiff had no difficulty in establishing a specific injury directly caused by the acquisition. Suppose, however, that *A* Corporation acquires *B* Corporation, which is a competitor of corporations *C* and *D*. Assuming that in the year following the acquisition the sales of *C* and *D* decline, it is still impossible to conclude that the decrease in sales was an injury caused by *A*'s acquisition of *B* (assuming the acquisition was a violation of § 7). As is readily apparent, the spectrum of difficulty in proving "injury" and "causation" in a private action is vast indeed. The lack of absolute standards in this area of antitrust litigation compounds the difficulty. It is no wonder that proving the fact of damage is one area in which the private plaintiff must tread most carefully in order to keep his suit successfully afloat.

AMOUNT OF DAMAGES

In addition to proving that the defendant's merger or acquisition violated § 7 and that the violation directly injured his person or property, the plaintiff must prove a reasonably certain amount of damages flowing from that injury. This is one of the most difficult tasks for the private plaintiff since it frequently requires the consultation and expert testimony of economists and certified public accountants.¹¹⁶ Because in most instances the plaintiff is seeking recovery for lost profits or decreased busi-

113. *Id.*

114. In making this ruling, the trial judge reaffirmed his findings made at an earlier trial which had been set aside because of insufficient consideration given to the prior Government judgment. For the complete text of that opinion, see 279 F. Supp. 361 (S.D.N.Y. 1967).

115. The facts of *Bostitch* are discussed at text accompanying notes 64-66 *supra*.

116. *Handling*, *supra* note 43, at 31-32. Compare *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), *rev'd on other grounds*, 340 U.S. 558 (1951) (accountant) with *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) (economists).

ness, his efforts to ascertain and estimate his damages may border on speculation.¹¹⁷ Damages based on speculation have never been permitted since speculations of witnesses "form no better basis of recovery than the speculation of the jury themselves."¹¹⁸ In spite of the difficulties involved in demonstrating the amount of damages, courts have permitted their award if the plaintiff has established a factual basis from which damages can be reasonably determined.¹¹⁹ Although "guessing" is not permitted, courts do not require mathematical certainty in proving the amount of damages.¹²⁰

A guideline for the resolution between the two extremes of mathematical certainty and sheer speculation was provided by the Supreme Court in the 1946 case of *Bigelow v. RKO Radio Pictures, Inc.*¹²¹ Recognizing the inherent difficulty in proving damages to a precise certainty in an antitrust case, the Court held that, as between the victim plaintiff and the wrongdoer defendant, the plaintiff should be awarded damages if he can provide a factual basis from which the jury can reasonably estimate the amount:

[T]he jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, "juries are allowed to act on probable and inferential as well as upon direct and positive proof. . . ." Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery. . . .

The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights.¹²²

117. *Handling*, *supra* note 43, at 31-32.

118. *Central Coal & Coke Co. v. Hartman*, 111 F. 96, 98 (8th Cir. 1901).

119. *TIMBERLAKE*, *supra* note 17, at 303.

120. *Id.* at 305.

121. 327 U.S. 251 (1946).

122. *Id.* at 264-66. See also *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544 (1941); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927);

Despite the *Bigelow* doctrine, the determination of what constitutes speculation and conjecture as opposed to reasonable estimates based on furnished facts continues to be a perplexing problem for litigants and judges.¹²³ This determination must of necessity be made on a case-by-case basis.¹²⁴ The Ninth Circuit attempted to state the general rule as follows:

Under all the facts in the case the damages must have a reasonable and fair relationship to the type, extent and period of the restraint applied, the number of outlets affected by the restraint and the kind of product, its price and saleability, the profit made on sales, and an estimate of the amount of profit lost by reason of the illegal activities of the defendant.¹²⁵

Frequently proof of the amount of damage is intertwined with proof of the fact of damage.¹²⁶ In a treble damage action based on § 7 of the Clayton Act, the problem may be further compounded because of that statute's proscription of mergers and acquisitions which may substantially lessen competition or tend to create a monopoly. The original appellate decision in *Gottesman*¹²⁷ alluded to the difficulty of proving the fact or amount of damages caused by a potential restraint of trade or monopolization.¹²⁸ *Bailey's Bakery* recognized the same difficulty; that is, that § 7 is concerned with anticipated but unimplemented acts of restraint.¹²⁹ However, the better theory seems to be that put forward by the Second Circuit in *Gottesman*:¹³⁰

The basis of the pretrial ruling [denying the money claim cause of action] was that a section 7 violation can cause no damage because it establishes only that harm was threatened, not that it occurred. *But if the threat ripens into reality we do not see why there can never be a private cause of action for damages.*¹³¹

Package Closure Corp. v. Sealright Co., 141 F.2d 972, 979 (2d Cir. 1944). See generally *TIMBERLAKE*, *supra* note 17, at 304-06; *Guilfoil*, *supra* note 44, at 657-61; *Handling*, *supra* note 43, at 31-33.

123. *TIMBERLAKE*, *supra* note 17, at 305.

124. *Id.* at 307.

125. *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 715 (9th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960). Cf. *TIMBERLAKE*, *supra* note 17, at 307.

126. *TIMBERLAKE*, *supra* note 17, at 302.

127. 414 F.2d at 956.

128. *Id.* at 961.

129. Cf. *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964).

130. 414 F.2d at 961.

131. *TIMBERLAKE*, *supra* note 17, at 308 (emphasis added).

It becomes readily apparent that if the plaintiff has to establish that the threatened harm (probable restraint or monopolization) has ripened into reality, he, in effect, has the burden of establishing an actual restraint or actual monopolization. Thus, the practical effect might be to transform into an action based on §§ 1 and 2 of the Sherman Act a suit based on § 7 of the Clayton Act.¹³²

Proving the amount of damages directly resulting from an illegal merger or acquisition is at least as difficult as proving the amount of damages resulting from other antitrust violations. For example, in a horizontal merger situation, the plaintiff, a corporation, may argue that the merger forced it to lower its prices in an effort to remain competitive and that, in spite of this action, its sales volume decreased. If the merger is illegal, the plaintiff would seek damages to recover profits lost because of the merger. In addition, the plaintiff may argue that its decreased earnings caused an additional amount of injury in the form of a decreased return on its capital investment.¹³³ In order to furnish a sufficient factual basis upon which the amount of damages can be reasonably calculated, the plaintiff must produce credible witnesses who can construct an economic analysis model simple enough for the jury to comprehend yet sophisticated enough to convey the facts and figures necessary to compute the requested amount of damages.

The method by which the amount of damages is proven can be one of several alternatives. Most common is the "before and after" or "temporal"¹³⁴ method in which the plaintiff produces facts and figures¹³⁵ of his economic position both before and after the illegal merger or acquisition.¹³⁶ This theory can be a very effective way of portraying the amount of damages inuring to the plaintiff. Such an approach has substantial validity if the effect of the illegal merger or acquisition can be isolated and other economic variables (for example, general recession, inflation, strikes) can be extracted before the evidence is presented at trial.¹³⁷ The courts have accepted this method as one which presents both

132. *Id.*

133. *TIMBERLAKE*, *supra* note 17, at 317-31.

134. *See* *Central Coal & Coke Co. v. Hartman*, 111 F. 96, 98-9 (8th Cir. 1901); *cf.* *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

135. If this method is used, the jury should be instructed that the facts and figures being used are real, rather than hypothetical, in order to avoid having the jury make their own economic adjustments on the basis of facts they remember from their personal experiences.

136. *Greenwald, The Measurement of Damages in Private Antitrust Suits*, 5 *ANTI-TRUST BULL.* 293, 300-01 (1960) [hereinafter cited as *Greenwald*].

137. *See* *TIMBERLAKE*, *supra* note 17, at 331-33.

a sufficient factual basis and one that will withstand any argument that damages were based on speculation and conjecture.¹³⁸

Another method of proving the amount of damages is by the "cross-sectional"¹³⁹ or "yardstick"¹⁴⁰ theory, by which evidence is presented as to the economic position of the plaintiff and is then compared with evidence which depicts the economic position of a competitor.¹⁴¹ The corporation used as the yardstick must be a comparable business.¹⁴² For a private action predicated on a violation of § 7, it must be in the same product market and the same geographic market. In addition, extraneous variables must be removed from the testimony in order that a minimal amount of variance owing to unrelated and uncontrollable collateral factors is present. The verdict will, therefore, be an amount reflective of the damage caused solely by the illegal merger or acquisition. If constructed correctly, this method can be very effective and sufficiently factual to permit a reasonable computation of damages.

A third method suggested for providing a factual basis from which damages may be reasonably estimated is the use of expert witnesses.¹⁴³ A highly qualified economist or management consultant presents his opinion as to what would have happened had the illegal merger or acquisition not occurred. His hypothetical analysis will enable the jury to compute the amount of damages reasonably. Expert testimony alone is not sufficient, however. The plaintiff must also present facts relating to his business so that the expert's opinions can be applied to the particular facts involved. This factual basis must be introduced to avoid or negate arguments that the verdict was a result of speculation based only on hypothetical situations. If the plaintiff has factual evidence of injury to his business, the expert testimony merely fills in the gaps. The defendant cannot complain since his antitrust violation created the risk of uncertainty.¹⁴⁴

Although the *Bigelow* decision relaxed the standard of proof in favor of the plaintiff, the nature of the problem, proving what would have happened if the merger had not taken place, always subjects the verdict

138. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709 (9th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960).

139. *TIMBERLAKE*, *supra* note 17, at 331-33.

140. *Id.* at 333-39.

141. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

142. *Greenwald*, *supra* note 136, at 295.

143. *United States v. Cooper*, 312 U.S. 600 (1941); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 39 F. Supp. 117 (S.D.N.Y. 1941). See *Handling*, *supra* note 43, at 30.

144. See, e.g., *United States v. Borden Co.*, 347 U.S. 514, 518-19 (1954); *Dallas Corp. v. Margon Corp.*, 164 F. Supp. 41, 65 (D.N.J. 1958), *aff'd*, 275 F.2d 202 (3d Cir. 1960).

to the attacks of speculation and conjecture. However, if the plaintiff has utilized an accepted method of measuring his damages, he will be certain that he has furnished a factual basis from which the amount of damages can be reasonably inferred and computed. The quantum of damages will always depend on the operating and financial data of the plaintiff's business.¹⁴⁵ Proper presentation of these facts will insure the private plaintiff that his verdict has a sufficient factual basis to be upheld on appeal.

PROPER PLAINTIFFS

In a private action seeking redress for an illegal merger or acquisition, as in any private antitrust action, the plaintiff must have standing. In general, antitrust law takes a more restrictive view than does tort law in defining those plaintiffs who have standing to bring actions for damages. The plaintiff must, of course, have suffered injury.¹⁴⁶ An injury to the public interest is insufficient;¹⁴⁷ it must be an injury to the plaintiff's business.¹⁴⁸ The difficulty arises in the determination of the directness of the plaintiff's injury. Compounding, or perhaps causing, the problem is the fact that any recovery is automatically trebled. Thus, the potential liability of a defendant would become astronomical if an overly wide scope of standing were recognized by courts. Judge Wyzanski alluded to this in an early case:

In effect, businessmen would be subjected to liabilities of indefinable scope for conduct already subject to drastic private remedies. Courts aware of these considerations have been reluctant to allow those who were not in direct competition with the defendant to have a private action even though as a matter of logic their losses were foreseeable.¹⁴⁹

145. See, e.g., *Beegle v. Thomson*, 138 F.2d 875, 881 (7th Cir. 1943); *Burhead v. Phillips Petroleum Co.*, 308 F. Supp. 120 (N.D. Cal. 1930); Pollock, *The "Injury" and "Causation" Elements of a Treble Damage Antitrust Action*, 57 NW. U.L. REV. 691, 693-95 (1963); Note, *Standing to Sue for Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 574 (1964) [hereinafter cited as *Standing*].

146. *Snow Crest Beverages v. Recipe Foods*, 147 F. Supp. 907, 909 (D. Mass. 1956).

147. *Harrison v. Paramount Pictures*, 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

148. See, e.g., *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957); *Peter v. Western Newspaper Union*, 200 F.2d 867, 872 (5th Cir. 1953). See generally *TIMBERLAKE*, *supra* note 17; *Standing*, *supra* note 145, at 582.

149. *Snow Crest Beverages v. Recipe Foods*, 147 F. Supp. 907, 909 (D. Mass. 1956). See also *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953); *Rogers v. American Can Co.*, 187 F. Supp. 532 (D.N.J. 1960), *aff'd*, 305 F.2d 297 (3d Cir. 1962); *Kogan v. Schenley Indus., Inc.*, 20 F.R.D. 4 (D. Del. 1956); *Gomberg v. Midvale Co.*, 1955 Trade Cas. 71,070 (E.D. Pa. 1955). See generally *Blake, The*

The problem continually arises and demands consideration in every case. Whether an injury is direct and proximate or whether it is remote and incidental is a question which by its very nature is susceptible of no definitive rule.¹⁵⁰ Although no general rule has yet been formulated, some rather consistent guidelines have evolved which delineate categories of persons who can and cannot institute private antitrust actions.

If a corporation makes an acquisition or merger which results in a substantial lessening of competition and a tendency towards monopoly, any corporation that has suffered a direct injury from that illegal merger or acquisition has standing. The cause of action, however, belongs only to the corporation. The corporation's right can be exercised by the corporation itself¹⁵¹ or by shareholders in a derivative suit.¹⁵² Although there was an early holding that stockholders could not bring a derivative action for treble damages since that remedy was essentially equitable,¹⁵³ that obstacle presumably has been eliminated with abolition of the distinction between law and equity.¹⁵⁴

While standing inheres in the corporation, either directly or deriva-

Shareholders' Role in Antitrust Enforcement, 110 U. PA. L. REV. 143 (1961); *Standing*, *supra* note 145, at 583.

150. *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U.S. 261 (1917) (Brandeis, J.).

151. *See Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953); *Gomberg v. Midvale Co.*, 1955 Trade Cas. 71,070 (E.D. Pa. 1955).

152. *General Inv. Co. v. New York Cent. R.R.*, 23 F.2d 822 (6th Cir.), *cert. denied*, 277 U.S. 588 (1928); *Continental Sec. Co. v. Michigan Cent. R.R.*, 16 F.2d 378 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1926); *Gomberg v. Midvale Co.*, 1955 Trade Cas. 71,070 (E.D. Pa. 1955); *cf. Ashwander v. TVA*, 297 U.S. 288 (1936); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963); *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910). *See generally* TIMBERLAKE, *supra* note 17, § 4.04 at 29 *et seq.*

153. TIMBERLAKE, *supra* note 17, at 29. In his treatise, Professor Timberlake points out that:

It might be possible in a particular fact situation for a stockholder to prove injury to himself. In *Peter v. Western Newspaper Union*, 200 F.2d 867 (5th Cir. 1953) the court followed the general rule that a stockholder cannot sue for injury to the corporation. However, the stockholder also claimed direct injury to him and the court recognized a right saying (p. 872): "A wrong causing a stockholder to part with his shares for less than their real value has been held to be a direct injury to the individual stockholder. *Coronado Development Corporation v. Milliken*, [175 Misc. 1, 22 N.Y.S.2d 670, 674, 675] and cases there cited." In the *Peter* case recovery was denied because prior to the sale of the stock "its depreciation in value had already been suffered from injuries directly affecting the corporation rather than the stockholder" (p. 872).

Id. In *Gomberg v. Midvale Co.*, 1955 Trade Cas. 71,070 (E.D. Pa. 1955), the plaintiff shareholders also sought a dual recovery (as private shareholders and derivatively), but their private action was dismissed as too remote and as improperly exalting the rights of shareholders over the right of creditors. *Cf. Ames v. American Tel. & Tel. Co.*, 166 F. 820 (D. Mass. 1909).

154. TIMBERLAKE, *supra* note 17, at 29.

tively, it does not extend to private shareholders who seek recovery for damages incurred by them rather than by the corporation. Courts have uniformly rejected the contentions of private stockholders that they have the requisite standing.¹⁵⁵ The rationale for such rejection is that any injury to the shareholders is too incidental and remote to support a cause of action.¹⁵⁶ More importantly, stockholders' private suits are not permitted because of the very nature of their claim. In a stockholder's private suit, the plaintiff is essentially seeking recompense for diminution in the value of his stock rather than recovery for the corporation. The target of the illegal merger or acquisition, however, was the corporation, not the stockholders.¹⁵⁷ By requiring a single corporate action rather than multiple private stockholder actions, the rule is predicated upon sound policy.¹⁵⁸

For the same reasons, courts have consistently held that any injury to officers, directors and employees is too peripheral to support a private, independent action for damages suffered essentially by the corporation. Even if an officer or an employee has his employment relationship severed as a result of the illegal merger or acquisition, his injury is, as a matter of law, too remote to merit standing. Although most employment terminations caused by antitrust violations are probably a result of conspiracies proscribed by § 1 of the Sherman Act, it is possible that in a violation of § 7 of the Clayton Act a lessening of competition would force residuary firms to pare their employment rosters in order to stay alive economically. Regardless, the former employee would have no cause of action because of the well settled rule that individual injuries sustained by corporate employees through monopolistic practices are too remote and incidental.¹⁵⁹

Like shareholders and employees, creditors of an injured corporation are also denied standing. Standing is denied even if the infraction has rendered the injured corporation unable to pay its outstanding debts to the creditor. This rule has been extended to deny standing to any creditor

155. *Id.* at 29-30.

156. *See, e.g.*, *Darden v. Besser*, 257 F.2d 285 (6th Cir. 1958); *Walder v. Paramount Pub.*, 132 F. Supp. 913, 916 (S.D.N.Y. 1955); *Gerli v. Silk Ass'n*, 36 F.2d 959 (S.D.N.Y. 1929); *Corey v. Boston Ice Co.*, 207 F. 465, 466 (D. Mass. 1913). *See generally*, *TIMBERLAKE*, *supra* note 17, at 29.

157. *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

158. *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910); *Gerli v. Silk Ass'n*, 36 F.2d 959 (S.D.N.Y. 1929). *See generally*, *TIMBERLAKE*, *supra* note 17, § 4.05, at 34-35.

159. *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

wishing to enforce the antitrust laws.¹⁶⁰ Even suppliers are included within the scope of the rule. It has been well established that a supplier is too remote and far removed from the target area to recover damages resulting from a violation of the antitrust laws directed against the supplier's customers.¹⁶¹

In spite of the broad and enthusiastic encouragement given for private enforcement of the antitrust laws, the number of potential plaintiffs has been restricted because of the standing rules. Although the injured corporation has standing, either on its own or through a derivative suit, "shareholders, creditors, directors, and officers of corporations injured by monopolistic practices of competitors cannot recover their individual losses"¹⁶² because they have no standing.

CONCLUSION

A significant evolution in the area of private litigation predicated on violations of § 7 of the Clayton Act has occurred within recent years.¹⁶³ Recent litigation, most notably the *Gottesman* and *Kirihara* cases, has recognized the private plaintiff's right to seek treble damages based on illegal mergers or acquisitions. Attempts to procure equitable remedies, such as injunction or divestiture, have been few; however, the right to injunctive relief has been steadfastly upheld, and the right to divestiture is heading in an affirmative direction.

If the Government has obtained a prior judgment of a § 7 violation, the plaintiff's burden is eased significantly. But in view of the less restrictive standards necessary to prove a violation of the Clayton Act, vis-à-vis the standards for Sherman Act violations, the burden of proving the § 7 violation is the least oppressive of the necessary elements. More burdensome is proof of the fact of injury. Once the fact of injury is proved, proof of the amount of damages has been subject to a less onerous standard.

The issue of probabilities which is inherent in a private § 7 action, continues to plague private litigants. While courts have granted equitable relief pursuant to § 16, they have not yet awarded treble damages in a

160. *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3rd Cir. 1910); *Gerli v. Silk Ass'n*, 36 F.2d 959 (S.D.N.Y. 1929). See generally, *TIMBERLAKE*, *supra* note 17, § 4.05, at 34-35.

161. See, e.g., *Volasco Prod. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963). There is also a general rule that an association is without standing "to enforce the separate property rights of its individual members. . . ." *Alabama Independent Serv. Station Ass'n v. Shell Petroleum Co.*, 28 F. Supp. 386, 390 (N.D. Ala. 1939); *Northern Cal. Monument Dealers Ass'n v. Interment Ass'n*, 120 F. Supp. 93 (N.D. Cal. 1954).

162. *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

particular case. Thus, the road for a private plaintiff seeking treble damages is, indeed, little traveled and replete with chuckholes and other obstacles. It has yet to be successfully traversed. But, the prize of treble damages awaits the successful litigant, and it can be reasonably assumed that that goal will soon be attained.

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